Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

September 10, 2018

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278**

Dear Ms. Dortch:

On September 6, 2018, the following individuals met with Mark Stone, Dan Margolis, Kurt Schroeder, and Kristi Thornton of the Commission's Consumer and Governmental Affairs Bureau: Lucia Lebens, Vice President of Government Relations and Public Policy, Navient Corp. ("Navient"); Mark W. Brennan and Wesley Platt of Hogan Lovells US LLP, Counsel to Navient; and Michael Pryor of Brownstein Hyatt Farber Schreck, LLP, Counsel to Nelnet Servicing, LLC ("Nelnet").[1] At the meeting, we discussed the Petition for Reconsideration of the Commission's August 11, 2016 Report and Order ("*Order*")[2] filed by Great Lakes Higher Education Corp. ("Great Lakes"), Navient, Nelnet, the Pennsylvania Higher Education Assistance Agency ("PHEAA"), and the Student Loan Servicing Alliance ("SLSA").[3]

During the meeting, we encouraged the Commission to reconsider the *Order* and properly implement Congress's amendments to the TCPA, which exempt federal debt collection calls from the "prior express consent" requirement. Many key stakeholders, including federal agencies, borrower groups, and loan servicers, have highlighted the need for additional outreach to student loan borrowers. The Commission can advance Congress's goals of helping federal student loan borrowers get the information they need while promoting the timely repayment of billions of dollars of outstanding federal student loan debt by reconsidering the *Order* as requested in the Petition.

The increasingly one-sided record demonstrates that the Commission should allow more than three call attempts per month under the exemption. Servicers, federal agencies, and other commenters have provided a wealth of empirical evidence, and it all points to a substantially higher limit. For example, Nelnet showed that attempting up to 10 calls per month leads to 42%

[1] Mark Stone and Kristi Thornton participated by teleconference.

[2] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd 9074 (2016) ("*Order*").

[3] Great Lakes, Navient, Nelnet, PHEAA, and SLSA, Petition for Reconsideration (filed Dec. 16, 2016) ("Petition"); *see also* Great Lakes, Navient, Nelnet, PHEAA, and SLSA, Consolidated Reply (filed Feb. 13, 2017) ("Consolidated Reply"). Unless otherwise noted, all filings referenced in this document are in CG Docket No. 02-278.

more live contacts compared to attempting three calls per month.[4] Navient showed that 40 or more calls attempts are required to reach 25% of delinquent federal student loan borrowers, and that it is able to resolve delinquencies more than 90% of the time it has a live conversation with a borrower.[5] Navient also showed that successful enrollment in income-driven repayment ("IDR") plans can be increased by 50% by contacting the cell phones of previously delinquent borrowers.[6] In addition, Navient provided a chart showing that a number of government entities ***require*** more than three call attempts per month to borrowers.[7]

The Department of Education ("Department") warned specifically that three call attempts per month "would not afford borrowers sufficient opportunity to be presented with options to establish more reasonable payment amounts and avoid default."[8] The Bureau of Consumer Financial Protection ("BCFP") also proposed significantly higher limits in its debt collection rulemaking.[9]

In addition, the Treasury Department recently released a report describing a pilot program to service defaulted student loan debt, which explained that live contact "is critical to identifying and enrolling in a repayment option" and that borrowers "were often unaware of, or confused about, their repayment options."[10] Revised data from the Department also highlights the need for and importance of additional borrower outreach, showing that at least half of all students at more than 1,000 colleges and trade schools had defaulted or failed to pay down at least $1 on their debt within seven years – far more than the Department had previously estimated.[11]

Additionally, the Education Finance Council ("EFC") found that live contact with a student loan borrower led to the resolution of delinquency between 63 and 98% of the time, depending on the servicer, and that most of the time it takes only two calendar days to resolve a delinquency once live contact is established.[12] And the BCFP Student Loan Ombudsman released an annual report that explained that current outreach efforts "may be insufficient to assist a substantial share of borrowers."[13]

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[4] *See* Nelnet Comments at 14 (filed June 6, 2016). Based on this, Nelnet estimates that attempting 10 calls per month would help an additional 389,000 of its borrowers, which is just a fraction of all federal student loan borrowers, resolve delinquencies each year. *See* Consolidated Reply at 4.

[5] *See* Navient Comments at 9-10, 42-43 (filed June 6, 2016).

[6] *See id*. at 34.

[7] *See, e.g.*, Letter from Mark W. Brennan, Counsel, Navient, to Marlene H. Dortch, Secretary, FCC, App. A (filed Aug. 2, 2016); *Order*, O'Rielly Dissent.

[8] Letter from Ted Mitchell, Undersecretary, Department, to Marlene H. Dortch, Secretary, FCC, at 4 (filed July 11, 2016).

[9] BCFP, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016), http://bit.ly/2axWSZH ("*BCFP Proposal Outline*").

[10] Department of the Treasury, Bureau of the Fiscal Service, *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt* (2016), http://bit.ly/2gCCF3Q.

[11] *See, e.g*., Andrea Fuller, *Student Debt Payback Far Worse than Believed*, WALL ST. J. (Jan. 18, 2017), *available at* http://on.wsj.com/2l1LB5f.

[12] Letter from Debra J. Chromy, President, EFC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Feb. 1, 2017).

[13] The report recommended "[s]trengthening borrower communication" during critical periods, such as during a borrower's transition from the rehabilitation process to an IDR plan. *See* BCFP, *Annual Report of the CFPB Student Loan Ombudsman* at 47 (Oct. 2016), http://bit.ly/2kJFtCh.

Meanwhile, no party has shown how the choice of "three" call attempts per month is supported by data or other empirical evidence in the record. Indeed, this limit lacks a rational basis and appears drawn from thin air. Worse, it will impede servicers' ability to help borrowers and is impossible to square with the data and input from numerous stakeholders, including other federal agencies. In contrast, a materially higher limit would help allow meaningful borrower contact and effective collection of federal debts.[14]

We also explained that the exemption covers certain calls to numbers other than those provided by borrowers. Many parties agree on this point**,** including the Association of Community College Trustees,[15] National Association of College and University Business Officers ("NACUBO"),[16] ACA International,[17] and National Consumer Law Center ("NCLC").[18] Such calls are made "solely to collect" a federal debt. Skip tracing and contacting individuals listed in a borrower's loan file, for example, are often a critical tool for locating borrowers,[19] and, in some cases, these activities are even required by the Department's rules.[20] The BCFP's debt collection proposals acknowledge the value of such calls and would allow up to six call attempts per week or one live communication with such individuals in some cases.[21]

Moreover, calls to reassigned or wrong numbers must be allowed under the exemption to avoid undermining Congress's intent. As Commissioner O'Rielly explained, the *Order's* "outright prohibition on misdialed calls and calls to entities other than the borrower, as well as the effective ban on calls to reassigned numbers do not balance the benefits and concerns as the revised order claims. They run counter to the law."[22] While we agree with NCLC that databases could help callers avoid some calls to reassigned numbers, callers currently have no viable means to entirely avoid reassigned numbers.[23]

During the meeting, we also explained that the FCC took an impermissibly broad view of its jurisdiction under the amended TCPA. The Commission interpreted the amendments as creating new, freestanding authority for it to regulate federal debt collection calls. This interpretation contradicts the statutory text and Congress's intent, leads to absurd consequences, and ignores the principle of sovereign immunity.[24] Chairman Pai explained in his dissent that the interpretation "is unlawful and makes a dog's breakfast of the TCPA."[25] Commissioner O'Rielly called it "absurd."[26] None of the parties who commented on the Petition even attempted to defend this interpretation, and even NCLC called it a "rather absurd and strained reading of the Budget Act Amendment."[27]

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[14] *See, e.g*., Petition at 5.
[15] *See* Ass'n of Community College Trustees Reply Comments at 4 (filed June 21, 2016).
[16] *See* NACUBO Reply Comments at 2 (filed June 21, 2016).
[17] *See* ACA Int. Comments at 11 (filed June 6, 2016).
[18] *See* NCLC *et al*. Reply Comments at 9 (filed June 21, 2016) ("[W]e do not think it necessary for callers to be limited to calling the numbers originally provided by the debtors.")
[19] *See, e.g*., Navient Reply Comments at 23 (filed June 21, 2016).
[20] *See* 34 C.F.R. § 682.411(h), (m).
[21] *BCFP Proposal Outline* at 28.
[22] *Order*, O'Rielly Dissent.
[23] *See, e.g*., Consolidated Reply at 6; NCLC Opposition at 16-17.
[24] *See, e.g*., *Petition* at 16-21.
[25] *Order*, Pai Dissent.
[26] *Order*, O'Rielly Dissent.
[27] See NCLC Comments at 61 (filed June 13, 2018).

The FCC similarly exceeded its authority by adopting rules that impose limits other than on the "number" and "duration" of exempt federal debt collection calls. Although the Commission characterized its rules in the *Order* as limiting only the "number" and "duration" of calls,[28] the rules are in fact far broader in scope. For example, the rules restrict who may be called under the exemption, require calls and text messages to include certain disclosures, and create an opt-out requirement.[29] As explained in the Petition, the Commission's rules are an abuse of discretion to the extent that they extend to elements beyond of the "number" and "duration" of calls under the new exemption.[30]

We also explained that the Commission should confirm that the exemption covers Federal Family Education Loan Program ("FFELP") loans, which are federally guaranteed. FFELP loans fall squarely within the exemption, although some confusion exists about this point. For example, a federal district court recently interpreted a footnote in the *Order* (which discussed mortgage debts) to mean that that Congress's exemption covers FFELP loan calls only when the federal government's obligations as the guarantor have been triggered and are active.[31] This cannot be the correct outcome, as it all but ensures that the affected borrowers would fall further into delinquency and potential default, thereby triggering the government's obligations anyway.

We also explained that the Commission should confirm that the TCPA does not apply to federal contractors that comply with government directions. In light of the overwhelming consensus that the federal government is not a person as that term is defined in the Communications Act, it also appropriate to interpret that term, in the context of the TCPA to exclude federal contractors, as the Commission found in *Broadnet.*[32] Moreover, robust case law shows that derivative immunity extends to federal contractors regardless of agency status.[33] And the Budget Act Amendments do not authorize the Commission to impose TCPA requirements on the federal government and its contractors and these amendments and Broadnet do not completely overlap.[34] Meanwhile, state governments, like the federal government, need to be able to use cost-effective ways of communicating with their citizens and are presumed to not be included in the definition of the term "person."[35]

Finally, we noted the trend in TCPA class action cases of designating certain groups that participate in the Commission's TCPA proceedings as recipients of "*cy pres*" settlement funds.[36] When considering the record in this and other TCPA proceedings, the Commission should appropriately weigh the fact that such groups seem to benefit financially from the filing of TCPA lawsuits.

Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

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[28] *See, e.g., Order* ¶¶ 1-2, 5, 10, 30-49, 61; 47 U.S.C. § 227(b)(2)(H).
[29] *See Order* ¶¶ 38-41, 44.
[30] *See* Petition at 19-21.
[31] *See Henderson v. United States Aid Fund*, 2017 WL 766548 (S.D. Cal. Feb. 28, 2017); *Order* ¶ 19 n.54.
[32] *Broadnet et al., Declaratory Ruling*, 31 FCC Rcd. 7394 (2016) ("*Broadnet*").
[33] *See, e.g.*, SLSA *et al*. Comments at 3-8 (filed June 13, 2018).
[34] *See id*. at 3-8.
[35] *See id*. at 18-20.
[36] *See, e.g.*, *Willett et al. v. Redflex Traffic Systems, Inc. et al.*, Order Approving Settlement, 13-CV-1241 (D.N.M. Oct. 24, 2016) (approving a settlement agreement under which an organization appears to have received approximately $650,000 in *cy pres* funds earmarked specifically for TCPA advocacy at the FCC).

Respectfully submitted,

/s/ Mark W. Brennan
Mark W. Brennan
Partner
Counsel to Navient Corp.
mark.brennan@hoganlovells.com
D +1 202 637 6409

cc: Mark Stone
Dan Margolis
Kurt Schroeder
Kristi Thornton